

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

SUSSEX PINES COUNTRY CLUB,)

Appellant,)

v.)

SHIRLEY CONAWAY,)

Appellee.)

C.A. No. K10A-06-013 WLW

Submitted: September 22, 2011

Decided: November 29, 2011

ORDER

Upon Appellee's Motion for Attorney's Fees.

Granted in part.

William D. Rimmer, Esquire of Heckler & Fabrizzio, P.A., Wilmington, Delaware for Appellant.

Walt F. Schmittinger, Esquire of Schmittinger & Rodriguez, Dover, Delaware for Appellee.

WITHAM, R.J.

The issue before the Court is whether Appellee's motion for attorney's fees, pursuant to 19 *Del. C.* § 2350(f), should be granted.

FACTS¹

Shirley Conaway (hereinafter "Appellee") was injured in a workplace accident at the Sussex Pines Country Club (hereinafter "Appellant") in 1995. She has received benefits pursuant to State workers compensation law since that time. In 2009, Conaway experienced increased pain in her lower back and legs and returned to Dr. Biash Bose for treatment. Appellant's unemployment insurer, Selective Insurance (hereinafter "Selective") applied for utilization review pursuant to 19 *Del. Admin. C.* §1341-5.0. Utilization review determinations become final unless appealed to the Industrial Accident Board (hereinafter "the Board") within 45 days.² In reliance on the results of utilization review, Selective denied some of Appellee's claims. Appellee sought relief from the Board. The Board found that continued pain management treatment and diagnostic tests were reasonably necessary and related to the 1995 workplace accident. The Board also found that the claims were beyond the scope of the utilization review, and thus were not precluded by that determination. Appellant timely filed an appeal with Superior Court. In an opinion dated August 23,

¹This statement of facts is a brief summary of the facts taken from the Court's ruling in *Sussex Pines Country Club v. Shirley Conaway*, C.A. No. K10A-06-013 (Del. Super. Aug. 23, 2011).

²19 *Del. Admin C.* § 1341-5.5.1

2011, this Court affirmed the decision of the Board.³

Appellee now moves for attorney's fees pursuant to 19 *Del. C.* § 2350(f).

Standard of Review

19 *Del. C.* § 2350(f) states:

The Superior Court may at its discretion allow a reasonable fee to claimant's attorney for services on an appeal from the Board to the Superior Court and from the Superior Court to the Supreme Court where the claimant's position in the hearing before the Board is affirmed on appeal. Such fee shall be taxed in the costs and become a part of the final judgment in the cause and may be recovered against the employer and the employer's insurance carrier as provided in this subchapter.

DISCUSSION

As noted above, Appellee's case was affirmed on appeal to this Court, and thus, 19 *Del. C.* § 2350(f) applies. Appellee moves for attorney's fees in the amount of \$9,866.67 based on 34 hours of work by associate attorneys at \$200.00 per hour and 2 hours of work by Mr. Schmittinger at a rate of \$300.00 per hour, plus an additional one-third for the contingent nature of the litigation.

Appellant argues that 36 hours of work on a limited issue with which Appellee's counsel has extensive experience seems excessive. Appellant asks that the Court lessen the fee pursuant to the decisions of this Court but points out no decision in particular.

19 *Del. C.* § 2350(f) was created "to prevent depleting a claimant's

³*Sussex Pines*, C.A. No. K10A-06-013.

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compensation award through attorney's fees incurred where a claimant successfully resists and defends an employer's meritless appeal."⁴ Awarding attorney's fees pursuant to § 2350(f) is an exercise of judicial discretion guided by the factors set forth in *General Motors Corporation v. Cox*.⁵ The eight factors enumerated in *Cox* are now listed in Delaware Lawyers' Rule of Professional Conduct 1.5(a).⁶ Those factors read as follows:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.⁷

The Court finds no reason to doubt the certification of Mr. Schmittinger in

⁴*Falconi v. Coombs & Coombs, Inc.*, 2006 WL 3393489, at *3 (Del. Super. Nov. 21, 2006) (quoting *Research Techs. Servs. v. Hedden*, 1999 WL 41793, at *2 (Del. Super. Jan. 12, 1999)).

⁵304 A.2d 55, 57 (Del. 1973).

⁶*Falconi*, 2006 WL 3393489, at *3.

⁷*Del. Prof. Cond. R. 1.5(a)*.

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regard to the hours worked by his law firm on this case, and Appellant presents no evidence of fee inflation other than the bare assertion that the fees are excessive. In light of the time certified by Mr. Schmittinger, the reasonable hourly rates, and the experience and ability of Mr. Schmittinger in such matters, the Court finds the initial calculation of attorney's fees to be reasonable without the additional one-third fee.⁸

Appellee's counsel also urges an additional one-third for the contingent nature of the litigation, citing *Quality Car Wash v. Cox*⁹ and *In the Matter of Ronald Cox*.¹⁰ According to Appellee's own case, fees in addition to the charge for time expended are not routinely granted.¹¹ In *Quality Car Wash*, the Court found that such an additional fee was warranted for a case in which counsel operated on a contingency fee basis, the questions involved were novel and difficult, the likelihood of success was doubtful, and the size of the recovery was significant.¹² *In the Matter of Ronald Cox* is inapplicable here as it dealt with an extraordinary effort for a contingency fee.¹³ Appellee sets forth the agreement to work for a contingency fee as the only factor in support of the one-third multiplier of the attorney's fee. In the opinion of

⁸*See id.* 1.5(a)(1), (3), (7).

⁹1983 WL 476625 (Del. Super. Feb. 25, 1983).

¹⁰1984 WL 21201 (Del. Ch. June 7, 1984).

¹¹*Quality Car Wash*, 1983 WL 476625, *1.

¹²*Id.*

¹³*See* 1984 WL 21201.

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this Court, none of the other factors in favor of a multiplier apply. Thus, the Court grants the motion for attorney's fees as follows: (\$200.00 per hour x 34 hours) + (\$300.00 per hour x 2 hours) = \$7,400.00

CONCLUSION

Appellee's motion for attorney's fees pursuant to 19 *Del. C.* § 2350(f) is hereby granted in part in the amount of \$7,400.00.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel